Office-Supreme Court, U.S.
FILED
MAY 13 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 93

SAMUEL DODD WILLIAMSON,

Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Brief of Amicus Curiae of the American Civil Liberties Union of Southern California.

SAUL COHEN,
120 El Camino Drive,
Beverly Hills, California,

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Interest of amicus curiae i

Statement of the case 2

Summary of argument 2

Argument 3

I.

A finding by a jury that a book is obscene is not an ordinary finding of fact and cannot, constitutionally, be subject only to limited appellate review 3

II.

The standard by which the book here involved should be judged is a national standard and not the standard of the southeastern portion of Los Angeles County 5

III.

The book here involved is not obscene and is therefore entitled to constitutional protection 6

Conclusion 7

TABLE OF AUTHORITIES CITED

Cases	Page
Alberts v. California, 354 U. S. 476	3
Manual Enterprises, Inc. v. Day, 370 U. S. 478	4, 5, 6
Roth v. United States, 354 U. S. 476	3, 7
Schaeffer v. United States, 251 U. S. 468	4

Statutes

California Penal Code, Sec. 311	2
United States Constitution, First Amendment	1, 6, 7
United States Constitution, Fourteenth Amendment	1, 6, 7

Textbook

Chafee, Free Speech in the United States (Harv. Univ. Press, 1941), p. 509	4

IN THE

Supreme Court of the United States

October Term, 1962

No.....

SAMUEL DODD WILLIAMSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Brief of Amicus Curiae of the American Civil Liberties Union of Southern California.

Interest of Amicus Curiae.

The interest of the American Civil Liberties Union of Southern California in this case arises from the fact that it is a non-partisan organization dedicated to the protection of American constitutional principles relating to civil liberties. It believes that in this case there has been a violation of the constitutional principles of freedom of expression which are embodied in the First and Fourteenth Amendments to the United States Constitution.

Statement of the Case.

The defendant was convicted of violation of Section 311 of the California Penal Code which at the time of violation provided that "Every person who wilfully and lewdly . . . sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper or book . . . is guilty of a misdemeanor." The defendant sold to a police officer a copy of a book entitled *Fear of Incest* by March Hastings, which act led to his arrest and conviction.

Summary of Argument.

A finding by a jury that a literary work is obscene is not subject to the limits on appellate review which are applicable where an ordinary question of fact is at issue.

The book here involved should be judged by a national standard and not the standard of the southeastern section of Los Angeles County.

If judged by the properly applicable standard, the book here involved is not obscene.

ARGUMENT.

I.

A Finding by a Jury That a Book Is Obscene Is Not an Ordinary Finding of Fact and Cannot, Constitutionally, Be Subject Only to Limited Appellate Review.

If any limitation on freedom of speech and press is to be permitted on the ground of obscenity, the nature of the material sought to be suppressed is crucial, and the finding of a jury should not be conclusive nor subject to the restrictions on appellate review which are applicable to ordinary questions of fact. What Mr. Justice Harlan said in his concurring and dissenting opinion in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476, 497-498 (*cf.* his doubts were a jury to find Joyce's "Ulysses" or Boccacio's "Decameron" to be obscene), is applicable here. The view of the court below is directly contrary thereto. For the determination of obscenity for purposes of deciding whether the material is constitutionally protected is not an issue of fact in the conventional sense, but is "a question of constitutional *judgment* of the most sensitive and delicate kind;" "the constitutional problem becomes one of particularized judgments which appellate courts must make for themselves." (*Ibid.*; emphasis in original).

The question of whether or not the book here involved is obscene, an issue "involving factual matter entangled in a constitutional claim . . . is ultimately

one for this Court. "The relevant materials being before us, we determine the issue for ourselves." *Mounal Enterprises, Inc. v. Day*, 370 U. S. 478, 488. If a book may lawfully be suppressed because a jury has found it to be obscene under a vague and ambiguous definition that has troubled courts and legal scholars, then the crucial issue is effectively insulated from independent constitutional judgment.

Moreover, a trial of a book obscenity case is not unlike a trial of a newspaper sedition case. As in the latter, "the trial provided for is one by judge *and* jury; and the judge may not abdicate his function." (Mr. Justice Brandeis, dissenting, in *Schaeffer v. United States*, 251 U. S. 468, 483; emphasis in original). Peculiarly in cases like this one, it is necessary for "the reviewing power of the Supreme Court to become an effective legal machinery for the protection of freedom." (Chafee, *Free Speech in the United States*, Harv. Univ. Press, 1941, p. 509) for "it is precisely (in such a case) that the protection of the jury proves illusory." (*ibid.* p. 70).

Accordingly, the court below abdicated its function and this Court should grant review.

II.

The Standard by Which the Book Here Involved Should Be Judged Is a National Standard and Not the Standard of the Southeastern Portion of Los Angeles County.

Would a jury's determination be binding today if it found Whitman's *Leaves of Grass* or Remarque's *All Quiet on the Western Front* or Steinbeck's *The Grapes of Wrath* (or a work of Chaucer, Rabelais or Shakespeare) to be obscene? May Americans living in New York and California be denied access to an important book being read and discussed by residents of Massachusetts and Oregon?

If a book may be judged obscene by a local community standard, then a work proscribed by a jury in one section of Los Angeles County could not be read by residents of other sections. What bookseller will stock a book found to be obscene, regardless of its merit and social importance, if he thereby risks prosecution? The level of the literature available to that small minority which regularly reads books and is concerned with literature would be subject to the opinion of twelve persons who may not have read a book in years and whose knowledge and appreciation of art and literature is extremely circumscribed.

". . . [D]enying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of 'decency' is labeled an "intolerable consequence" by Mr. Justice Harlan in *Manual Enterprises v. Day*, 370 U. S. 478, 488. Only the application of a national standard will prevent the relevant

guarantees of the First and Fourteenth Amendments from meaning different things in different states, will prevent the intolerable consequence to which Mr. Justice Harlan referred.

The question has not been decided by this Court; it should be.

III.

The Book Here Involved Is Not Obscene and Is Therefore Entitled to Constitutional Protection.

If the Court considers the dispositive question of whether or not the book here involved, taken as a whole and applying a contemporary national standard, is obscene in the sense necessary to deprive the book of constitutional protection, it is respectfully submitted that only one reasonable conclusion is possible: regardless of its literary merit, regardless of the fact that some persons might find offensive the candor with which the sexual relations of the central character are described, regardless of the pejorative adjectives which some readers might choose to apply to the book, it is a book which, "taken as a whole, cannot under any permissible constitutional standard be deemed to be beyond the pale of contemporary notions of rudimentary decency," to use the words of Mr. Justice Harlan in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 489.

Fear of Incest is not hard-core pornography. It is no more candid in its description of sexual activity than a large part of the fiction freely available to the public today, including best sellers and book club selections. In any event, candor in the description of sexual activity is not sufficient to deprive a book of the pro-

tection of the provisions of the First Amendment which are embodied in the Fourteenth Amendment to the United States Constitution. As Mr. Justice Brennan stated in *Roth v. United States*, 354 U. S. 476, 487, "sex and obscenity are not synonymous". Surely, if the Constitution protects ideas we loathe, ideas we find extremely offensive and distasteful, how can it fail to protect expression simply because of its candor in the discussion of sexual matters. It is a strength of our civilization, and not a weakness, that it tolerates the expression of ideas we loathe and candor we deplore.

If this book is held to be beyond the pale of constitutional protection, the door barring intrusion into the area of the First Amendment will, indeed, have been "left ajar."

Conclusion.

The petition for Writ of Certiorari should be granted.

Respectfully submitted.

SAUL COHEN,
A. L. WIRIN,
FRED OKRAND,
Attorneys for Amicus Curiae.